IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAMES LEE WALTERS, Appellant.	)	No. 64967-1-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: June 7, 2010

Grosse, J. — A prosecutor's comments on the credibility of witnesses do not amount to misconduct when such comments are made during closing argument and are based on inferences that can be drawn from the evidence. Here, the prosecutor did not express his personal beliefs about the veracity of the victim, but rather argued that the evidence supported the victim's statements. James Walters raises additional issues, none of which have any merit. We affirm the judgment and sentence.

FACTS

On March 8, 2006, 13-year-old S.L. was abducted on her way home after school. S.L. lived in a rural area and access to her home was gained through a gate that crosses the road. The bus dropped S.L. off at 3 p.m. that day. The driver watched her enter the gated area. Access is gained by a key pad or an automatic clicker. S.L. lived approximately a mile and a half from the gated entrance. That day she had walked for about a mile. When she approached a fork in the road, she heard a branch snap. She turned and saw a man in a camouflage mask. S.L. testified that she thought it was her neighbor, Walters.

She testified that she asked, “Is that you Jimmy?” but did not get a response. She recalled saying something to the effect that he should not scare her like that. She turned and started to walk down the road toward her house when she was grabbed from behind. A towel was thrown over her head and held in place by duct tape that went around her head just below her nose. Her hands were duct taped in front of her. Walters rubbed her buttocks and then lifted her and carried her over his shoulder for a few minutes.

S.L. perceived that she was being taken through the horse fence that surrounded Walter’s property. She was then set down on her feet, but Walters grabbed her arm and the back of her neck as he led her through the woods. They ended up in a hole, where Walters made her sit down. He removed the duct tape from her hands, and S.L. tried to remove the towel from her head, but he stopped her and retaped her hands behind her back. He then placed duct tape in her mouth and taped over it. He licked a tear off her face. Shortly thereafter Walters’ cell phone rang. S.L. testified that Walters’ cell phone had a distinctive ring. She heard him flip open the phone and then close it. He then left. S.L. struggled out of the tape and went home, taking the long route rather than the shorter route through Walters’ property. She arrived home to find that her parents had been frantically calling around because she was not there when they arrived home.

S.L. testified that she thought Walters was her abductor because he was wearing clothes that she had seen him wear before and he was standing on

Walters' property. S.L. was best friends with Walters' daughter. She had visited his home many times. She testified that Walters was wearing a red flannel jacket, blue jeans, and brown boots. The jacket had elastic on its sleeves. She further testified that she had seen a photograph of Walters wearing that same jacket on the refrigerator in his home.

Police recovered duct tape from the vicinity in which S.L. was held. Clothing similar to that described by S.L. was found at Walters' home. Duct tape was also discovered in the home.

Walters was supposed to pick up his son and S.L.'s brother at the time of the abduction. He did not do so. S.L.'s parents drove the Walters' son home but did not see Walters at the house, although his truck was in the garage.

Police presented evidence that Walters' cell phone received a call at the time S.L. indicated hearing the telephone ring. Additional testimony from S.L.'s family and the police indicated that Walters knew certain details of the abduction before anyone had actually told him about it.

In this second trial,[1] Walters was convicted of first degree kidnapping and indecent liberties. He appeals, asserting prosecutorial misconduct, ineffective assistance of counsel, double jeopardy, and sufficiency of the evidence.

ANALYSIS

Prosecutorial Misconduct

Walters argues that the prosecutor committed prosecutorial misconduct

[1] In 2006, Walters was tried for these crimes, but the jury was unable to agree on a verdict and the judge declared a mistrial.

during closing arguments by asserting that the victim's testimony was credible and supported by other credible testimony. Because Walters did not object below, reversal is warranted only if Walters can prove the existence of prosecutorial misconduct, that it was material to the outcome of the trial, and that it could not have been easily remedied, such as through curative instructions.[2] This court reviews the prosecutor's allegedly improper statements during closing, considering "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.[3]

To establish prosecutorial misconduct, a defendant must establish the impropriety of the prosecutor's comments and their prejudicial effect.[4] "It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness."[5] But, as noted in State v. Millante, a prosecutor has wide latitude in drawing reasonable inferences from the evidence and may comment on the credibility of a witness based on evidence in the record.[6] In Millante, the defendant initially lied to the police when questioned regarding his involvement in the victim's death.[7] During closing argument, the prosecutor argued that this prior untruthful behavior indicated that Millante was not a credible witness and could have lied on the stand.[8] This court found no prosecutorial misconduct

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[2] State v. Suarez-Bravo, 72 Wn. App, 359, 366-67, 864 P.2d 426 (1994).
[3] State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).
[4] State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).
[5] State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), cert. denied, __ U.S. __, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).
[6] 80 Wn. App. 237, 250-51, 908 P.2d 374 (1995).
[7] Millante, 80 Wn. App 251.
[8] Millante, 80 Wn. App 251.

even though the prosecutor repeatedly used the word "lie" because, in context, the prosecutor was commenting on a witness's credibility based on evidence in the record.[9]

Similarly, in State v. Warren, the prosecutor argued that details about which a complaining witness testified had a "ring of truth" and were a "badge of truth" and that specific parts of that witness's testimony "rang out clearly with truth in it."[10] Our Supreme Court held that such argument was proper because it was based on the evidence presented at trial, rather than on the prosecutor's personal opinion.[11] Likewise, the prosecutor here was commenting on SL's credibility as supported by the record, not expressing a personal belief about her credibility. The prosecutor stated:

> Now, [S.L.] is a very credible witness. And going back to the first instruction you have, . . . you are the sole judges of the credibility of the witnesses . . . and all of it can be summed up by telling you that you should use your common sense and life experience.
> . . . .
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> Now what motive does [S.L.] have to fabricate? This is her best friend's father. Why is she going to say he did this to her? Once she says that, she knows. She knows once she says that, her best friend is gone, okay. [S.L.] has every motive in the world to want to say it was anybody but the defendant. She has no motive to lie, no reason to make it up, no ax to grind.
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> [S.L.] has an incredible memory of details. Now, it has been over two years since this crime was committed, and [S.L.] is still able to describe to you in detail how she was at the hole and she lifts up the mask that covers her head or the towel that covers her head and tries to pull the strip of duct tape across her mouth. And what happens? It doesn't stick very well. There is moisture on her cheek. She has been going through the cold, wet brush that afternoon in early March of 2006. It's a pretty

[9] Millante, 80 Wn. App 251.
[10] 165 Wn.2d 17, 30, 195 P.3d 940 (2008).
[11] Warren, 165 Wn.2d at 30.

> detailed statement to make, and much of her testimony is the same way. These details, these little details, have a ring of truth. How do you tell if a child is not telling you the truth? Common sense is the key. You start asking them details, and when you get to the details, it falls apart.

Like the prosecutors in Millante and Warren, the prosecutor here argued the evidence supporting the credibility of the witness, not his personal belief that the witness was telling the truth. We find no prosecutorial misconduct.

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance resulted in prejudice.[12] An attorney is presumed to have provided competent representation.[13] "Deficient performance is not shown by matters that go to trial strategy or tactics."[14] To demonstrate prejudice, the defendant must show that, but for the deficient performance, there is a reasonable probability that the outcome of the trial would have been different.[15] If one of the two prongs of the test is absent, we need not inquire further.[16]

Walters argues that he was entitled to the lesser degree instruction of second degree kidnapping and that his counsel's failure to request that instruction amounted to ineffective assistance of counsel. But, as noted in State v. Hassan, a decision to seek an acquittal instead of requesting a jury instruction

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[12] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).
[13] McFarland, 127 Wn.2d at 336.
[14] State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).
[15] Matter of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).
[16] Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, rev. denied, 162 Wn.2d 1007 (2007).

on the lesser included offense can be characterized as legitimate trial strategy.[17] In Hassan, the court found that the decision to not pursue a lesser included instruction on simple possession for the charge of possession of marijuana with the intent to deliver was a tactical one. The "determination of whether an all or nothing strategy is objectively unreasonable is a highly fact specific inquiry."[18]

Walters argues that counsel should have requested a second degree kidnapping instruction because the evidence of indecent liberties was scant (a lick of the cheek and a rubbing of the butt) and therefore the jury might have been more comfortable convicting him of the lesser crime. But failure to offer a lesser offense instruction is not deficient performance if it can be fairly characterized as part of a legitimate trial strategy to obtain an acquittal.[19] In State v. King, a man was convicted of second degree assault and argued that his counsel should have requested a lesser degree assault instruction.[20] However, the court observed that such an instruction would have most certainly resulted in conviction, and that counsel's decision to pursue an "all-or-nothing tactic" could have resulted in an acquittal.[21] This is equally true here. Indeed, in the previous trial which resulted in a hung jury, a lesser included instruction was not given. This supports defense counsel's tactical decision here . Under the facts we have before us, it is reasonable for counsel to have not requested a lesser included instruction.

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[17] 151 Wn. App. 209, 211, P.3d 441 (2009).
[18] Hassan, 151 Wn. App. at 219.
[19] State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979).
[20] 24 Wn. App. 495, 601 P.2d 982 (1979).
[21] King, 24 Wn. App. at 501.

Failure to Grant Mistrial

A trial court's decision to deny a motion for mistrial is reviewed for an abuse of discretion.[22] A trial court abuses its discretion in denying a motion for a mistrial only if its decision is manifestly unreasonable or based on untenable grounds.[23]

Walters contends that S.L.'s statement during her testimony impacted the jury to such an extent that a fair trial was no longer possible.[24] Walters asserted he was unable to impeach S.L. on her statement without bringing to light previous charges that had been filed against him. But the trial court noted that there was nothing prejudicial in the comment itself and a jury would not necessarily draw any negative inference therefrom. We agree and find the trial court did not abuse its discretion in denying the motion for new trial.

Double Jeopardy

Walters argues that because the jury had to find that Walters had an intent to commit indecent liberties in order to convict him for first degree kidnapping, the conviction for indecent liberties punished him twice for the same crime. The Fifth Amendment and article I, section 9 of the Washington State Constitution prohibit multiple punishments for the same offense.[25] Double jeopardy principles do not preclude separate convictions here because the charges were not the same in fact or law.[26] First degree kidnapping and

[22] In re Det. of Broten, 130 Wn. App. 326, 336, 122 P.3d 942 (2005).
[23] State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006).
[24] S.L. testified, "I am not sure if I'm allowed to say that . . . ."
[25] State v. Kier, 164 Wn.2d 798, 803, 194 P.3d 212 (2008).
[26] In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 47, 776 P.2d 114 (1989).

indecent liberties each include an element not included in the other.[27]

In In re the Personal Restraint of Fletcher, the defendant pleaded guilty to first degree kidnapping, first degree robbery, and first degree assault of one woman.[28] In his guilty plea statement, the defendant stated that he and an accomplice kidnapped two women in order to steal their car.[29] In a personal restraint petition, the defendant argued that his sentences should be vacated under the merger doctrine.[30] In considering whether the first degree robbery conviction merged into the first degree kidnapping conviction, our Supreme Court stated that the first degree kidnapping statute "only requires proof of *intent* to commit various acts, some of which are defined as crimes elsewhere in the criminal code."[31] The court further noted that the statute "does not require that the acts actually be committed."[32] Accordingly, the State is correct that the merger doctrine does not apply. The first degree kidnapping statute does not require that the indecent liberties actually be committed.[33]

Sufficiency of Evidence

Walters challenges the sufficiency of the evidence to convict him on either count. When reviewing a challenge to the sufficiency of the evidence we must consider the evidence in the light most favorable to the prosecution and determine whether "'any rational trier of fact could have found the essential

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[27] State v. Louis, 155 Wn.2d 563, 569, 120 P.3d (2005).
[28] 113 Wn.2d 42, 44-45, 776 P.2d 114 (1989).
[29] Fletcher, 113 Wn.2d at 45.
[30] Fletcher, 113 Wn.2d at 50.
[31] Fletcher, 113 Wn.2d at 52.
[32] Fletcher, 113 Wn.2d at 52 (citing RCW 9A.40.020).
[33] See Fletcher, 113 Wn.2d at 52-53.

elements of the crime beyond a reasonable doubt.'"[34] We assume the truth of the prosecution's evidence and all inferences that the trier of fact could reasonably draw from it.[35] We defer to the trier of fact to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of the witnesses.[36] "Circumstantial evidence is as probative as direct evidence."[37]

To convict Walters of first degree kidnapping, the jury was instructed that it had to find that he intentionally abducted SL with the intent to facilitate the commission of the crime of indecent liberties. To convict Walters of indecent liberties, the jury had to find that Walters knowingly caused SL to have sexual contact with him, that he was not married to S.L. at the time, and that such contact was by forcible compulsion.

Here, the victim herself testified that it was Walters who committed these acts. She recognized his clothing and his cell phone ring. There was additional circumstantial evidence regarding Walters' opportunity to commit the crime, the location of the crime, and statements that he made regarding S.L.'s abduction that he should not have known about at the time he made them. Credibility determinations are for the jury to make and will not be overturned on appeal.[38]

We affirm.

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[34] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)) (emphasis omitted).
[35] State v. Wilson, 71 Wn. App. 880, 891, 863 P.2d 116 (1993), rev'd in part on other grounds, 125 Wn.2d 212, 883 P.2d 320 (1994).
[36] State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964 (1998).
[37] State v. Vermillion, 66 Wn. App. 332, 342, 832 P.2d 95 (1992).
[38] State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Grosse, J

WE CONCUR:

Dwyer, J.

Schindler, J